

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR ENVIRONMENTAL)
RESPONSIBILITY,)
2000 P Street, NW, Suite 240)
Washington, D.C. 20036)

and)

DR. CHARLES MONNETT)
23833 Mountain Circle)
Chugiak, AK 99967)

Plaintiffs,)

v.)

Civil Action No.)

U.S. DEPARTMENT OF THE INTERIOR)
BUREAU OF OCEAN ENERGY)
MANAGEMENT)
3801 Centerpoint Drive, Suite 500)
Anchorage, AK 99503)

Defendant.)

COMPLAINT

PRELIMINARY STATEMENT

1. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, as amended, and the Privacy Act, 5 U.S.C. § 552a, *et seq.*, in order to compel the Bureau of Ocean Energy Management ("BOEM") to disclose records withheld wrongfully after a FOIA/Privacy Act request by Plaintiffs. FOIA requires that federal agencies respond to public requests for documents, including files maintained electronically, in order to increase public understanding of the workings of government and access to government information. The Privacy Act requires that federal agencies

provide an individual access to records or information contained in a system of records and pertaining to him upon request.

2. Plaintiffs sought records through a joint FOIA/Privacy Act request filed on November 1, 2012 to the BOEM headquarters in Washington, D.C. Plaintiffs also carbon copied the Alaska BOEM office on their November 1, 2012 request.
3. Plaintiffs sought records concerning the reprimand of Dr. Charles Monnet and other pertinent matters. Plaintiff Public Employees for Environmental Responsibility (“PEER”) filed the FOIA request in its own right and the FOIA and Privacy Act request for Plaintiff Dr. Charles Monnett.
4. On November 16, 2012, BOEM Headquarters acknowledged Plaintiffs’ request and assigned it tracking number BOEM 2013-00012.
5. On November 19, 2012, BOEM’s Alaska OCS Region acknowledged Plaintiffs’ request and assigned it a different tracking number, Request No. BOEM 2013-00007.
6. On December 17, 2012, BOEM Headquarters informed Plaintiffs that BOEM Headquarters was unable to respond to Plaintiffs’ Request No. BOEM 2013-00012 within the time limits established by the FOIA because consultation with the Department was ongoing.
7. On December 20, 2012, BOEM’s Alaska OCS Region responded to Plaintiffs’ FOIA/Privacy Act Request No. BOEM 2013-00007 and stated that “based on the volume of documents requested, complexity of the issues, the office’s overall workload and the large backlog of FOIA requests received by this office, there will be a delay in processing your request.”

8. On December 27, 2012, BOEM's Alaska OCS Region sent Plaintiffs an update on FOIA/Privacy Act Request No. BOEM 2013-00007 stating that there would be a delay in processing Plaintiffs' request. No timeline for a response was provided.
9. On March 5, 2013, Plaintiffs filed an appeal with the DOI FOIA Appeals Officer, Darrell Strayhorn for the constructive denial of Plaintiffs' requests for Request No. BOEM 2013-00007 and Request No. BOEM 2013-00012.
10. On March 25, 2013, Ms. Strayhorn responded to Plaintiffs' FOIA and Privacy Act appeal in two correspondences dividing the appeal in two and separating the appeal by offices. Ms. Strayhorn assigned the tracking numbers FOIA Appeal No. 2013-055 and Privacy Act Appeal No. PA2013-002 for the BOEM Headquarters Office. Ms. Strayhorn assigned the tracking numbers FOIA Appeal No. 2013-056 and Privacy Act Appeal No. 2013-003 for the Alaska OCS Region Office. Ms. Strayhorn stated March 5, 2013 was the date of receipt for Plaintiffs' FOIA/Privacy Act appeal.
11. To date, Plaintiffs have received no records responsive to the November 1, 2012 FOIA/Privacy Act request. There has been no resolution or further correspondence from BOEM regarding Plaintiffs' appeal.
12. BOEM has constructively denied Plaintiffs' request and is in violation of the FOIA and the Privacy Act by failing to respond within twenty work days. 5 U.S.C. § 552(a)(6)(A), 43 C.F.R. 2.16.
13. The actions of BOEM are arbitrary and capricious and constitute a violation of the FOIA and the Privacy Act. BOEM's conduct frustrates Plaintiffs' efforts to shed light on why a respected senior scientist was reprimanded for circulating scientific information to scientific colleagues. BOEM's actions also frustrate Plaintiffs' efforts to educate the

public regarding the status of resource deterioration in the Arctic Ocean and the extent to which federal agencies are adequately monitoring such developments and infringes on Dr. Monnett's right to access information the BOEM maintains pertaining to him.

14. Plaintiffs seek a court order requiring BOEM to produce immediately the documents sought in the November 1, 2012 FOIA/Privacy Act request as well as other appropriate relief.

JURISDICTION AND VENUE

15. This Court has jurisdiction over this action pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) and the Privacy Act, 5 U.S.C. § 552a(g). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).
16. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
17. This Court has the authority to award costs and attorneys' fees under 28 U.S.C. § 2412 and 5 U.S.C. § 552(a)(4)(E) and 5 U.S.C. § 552a(g)(3)(B).
18. Venue is properly vested in this Court under 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552a(g)(5), which permit FOIA and Privacy Act actions to be filed in the United States District Court for the District of Columbia.

PARTIES

19. Plaintiff Public Employees for Environmental Responsibility is a national nonprofit organization with tax-exempt status, with its main office located in Washington, D.C., and field offices located in California, Colorado, Florida, Massachusetts, Arizona, New Jersey, and Tennessee.

20. PEER is not a commercial enterprise for purposes of the fee waiver provisions of FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Among other public interest projects, PEER engages in advocacy, research, education, and litigation relating to the promotion of public understanding and debate concerning key current public policy issues, focusing on the environment, public lands and natural resource management, public funding of environmental and natural resource agencies, and ethics in government.
21. PEER is a service organization for current and former public employees. PEER works with public employees to address agency wrongdoing by providing a full range of services, including filing FOIA and Privacy Act requests with and on behalf of individuals and ensuring these requests are responded to.
22. Plaintiff Dr. Charles Monnett is a senior scientist with BOEM. Dr. Monnett was the lead author of a peer-reviewed observational note published in a 2006 issue of the journal *Polar Biology*. Dr. Monnett's work stimulated public awareness of climate changes in the Arctic including the effects of sea ice loss. Since the time of the 2006 issue, the Department of Interior Office of Inspector General has forged an investigation into Dr. Monnett and reprimanded him for this work.
23. Defendant BOEM, a bureau within the United States Department of Interior, is an agency of the United States as defined by 5 U.S.C. § 552(f)(1) and has the duty to provide public access to documents in its possession consistent with the requirements of the FOIA and the Privacy Act and is denying Plaintiffs access to its records in contravention of federal law.

FACTS

24. In a report of investigation concerning Dr. Charles Monnett by the Interior Office of

Inspector General released on September 28, 2012, there is a section concerning alleged unauthorized release of U.S. government documents. These excerpts discuss reviews conducted by Minerals Management Service (“MMS”) officials concerning Dr. Monnett. These officials were carried over into BOEM in their same capacities.

25. On November 1, 2012, Plaintiffs submitted a FOIA/Privacy Act request to BOEM’s Freedom of Information Act Officer. Plaintiffs requested the following information specifically referenced in that Inspector General report: 1) the referenced “2008 BOEM internal review of Monnett’s Government emails”, including the DVD produced by the “BOEM IT staff” at the request of Mr. Jeffrey Loman together with a copy of the “review of the emails [which] revealed that Monnett had forwarded several hundred BOEM email communications, including FOIA exempt emails and potentially sensitive data...”; 2) the Interior Office of Solicitor recommendation that “Loman send Monnett a formal letter of reprimand for forwarding FOIA exempt email to an unauthorized recipient; 3) a copy of the request from the Solicitor’s Office to then BOEM Alaska Regional Director John Goll “that Goll determine who was providing opposing parties with the protected email communications.”; 4) all written material including emails, and meeting notes reflecting the “discussions [which] took place over several weeks between BOEM management, Human Resources, and the Solicitor’s Office as to what actions should be taken. Goll said that the Solicitor’s Office determined that there was no clear course of disciplinary action.”; 5) all written material including emails, and meeting notes reflecting the following: “Loman recalled that several BOEM managers were challenged by a few of its scientists, who asserted that the activity Shell proposed would constitute what the National Environmental Policy Act describes as ‘significant impact’ to the

environment...Loman explained that the scientists' opposition was handled by BOEM managers through protracted conversations and email exchanges.”; 6) any materials describing why emails in question “were not in the administrative record” or the process by which they came to be omitted from the administrative record; 7) any materials documenting “that BOEM’s management and DOI Solicitor’s Office reviewed the 60 emails and determined that they were exempt from the FOIA request because of their deliberative and pre-decisional nature.”; 8) any BOEM decision documents concerning the reasons that BOEM acted on or did not act upon IG recommendations for administrative action related to Dr. Monnett contained in this investigative report; 9) any BOEM records from 2007 or 2008 indicating that Dr. Monnett had been advised of any agency policy concerning dissemination of FOIA-exempt material or pre-decisional communications.

26. A consent form executed by Dr. Monnett verifying his identity and designating Plaintiff PEER as the recipient for the records was submitted with the FOIA/Privacy Act request.
27. On November 16, 2012, BOEM’s Headquarters Acting FOIA Officer, Rosemary Melendy, acknowledged Plaintiffs’ request and assigned it tracking number BOEM 2013-00012. Ms. Melendy informed Plaintiffs that due to a need to consult with the Department of the Interior, BOEM would take a 10-workday extension under the DOI’s FOIA regulations (43 CFR 2.13(a)) in order to process the Plaintiffs’ request. Ms. Melendy stated a response would come on or before December 17, 2012.
28. On November 19, 2012, BOEM’s Alaska OCS Region Acting FOIA Officer, Natasha Alcantara, acknowledged Plaintiffs’ request and assigned it tracking number Request No. BOEM 2013-00007. Ms. Alcantara informed Plaintiffs that due to a need to consult with

the Department of the Interior, BOEM would take a 10-workday extension under the DOI's FOIA regulations (43 CFR 2.13(a)) in order to process Plaintiffs' request. Ms. Alcantara stated a response would come on or before December 17, 2012.

29. On December 17, 2012, BOEM Headquarters Acting FOIA Officer, Ms. Melendy, informed the Plaintiffs that BOEM Headquarters was unable to respond to BOEM-2013-00012 within the time limits established by the FOIA because consultation with the Department was ongoing. Ms. Melendy stated BOEM expected to complete Plaintiffs' request within approximately ten weeks.
30. On December 20, 2012, BOEM's Alaska OCS Region Acting FOIA Officer, Ms. Alcantara, responded to Plaintiffs' FOIA/Privacy Act Request No. BOEM 2013-00007. Ms. Alcantara stated that "based on the volume of documents requested, complexity of the issues, the office's overall workload and the large backlog of FOIA requests received by this office, there will be a delay in processing your request." Ms. Alcantara did not give the Plaintiffs any time frame for when the Alaska OCS Region office would respond to the FOIA/Privacy Act Request.
31. On December 27, 2012, BOEM's Alaska OCS Region Acting FOIA Officer, Ms. Alcantara, sent Plaintiffs an update on FOIA Request No. BOEM 2013-00007. Again, Ms. Alcantara stated that there would be a delay in processing the request. Ms. Alcantara did not provide Plaintiffs with a timeframe for a response to the FOIA Request.
32. On March 5, 2013, Plaintiffs filed an appeal with the DOI FOIA Appeals Officer, Darrell Strayhorn, for the constructive denial of Plaintiffs' requests for Request No. BOEM 2013-00007 and Request No. BOEM 2013-00012.

33. On March 25, 2013, Ms. Strayhorn responded to Plaintiffs' FOIA and Privacy Act appeal in two correspondences dividing the appeal in two, separating the appeal by offices and acknowledging receipt of the appeal on March 5, 2013. Ms. Strayhorn assigned the tracking numbers FOIA Appeal No. 2013-055 and Privacy Act Appeal No. PA2013-002 for the BOEM Headquarters Office. Ms. Strayhorn assigned the tracking numbers FOIA Appeal No. 2013-056 and Privacy Act Appeal No. 2013-003 for the Alaska OCS Region Office.
34. To date, Plaintiffs have received no records responsive to the November 1, 2012 FOIA/Privacy Act request. BOEM has given no indication that responsive documents will soon be forthcoming or that it intends to begin production in a rolling production schedule. There has been no resolution or further correspondence from BOEM regarding Plaintiffs' appeal other than the response letter stating the receipt of appeal is March 5, 2013 and assigning tracking numbers. The FOIA requires an agency to make a determination on an appeal within 20 workdays after the receipt of such appeal. 5 U.S.C. § 552(a)(6)(A)(ii).
35. BOEM has constructively denied Plaintiffs' request and is in violation of FOIA by failing to respond within twenty work days and by failing to respond to Plaintiffs' appeal. 5 U.S.C. § 552(a)(6)(A), (C).
36. The Privacy Act does not specifically define a response time limit. 5 U.S.C. § 552a(d). However, according to Department of Interior ("DOI") policy when FOIA and Privacy Act requests are combined the time limits set by the FOIA are followed. 383 DM 6.11, 43 C.F.R. 2.16. DOI regulations also require that a Privacy Act Request be responded to "promptly." 43 C.F.R. 2.239. BOEM has constructively denied Plaintiff Monnett's

Privacy Act request and is in violation of the Privacy Act by failing to respond promptly and within the timelines required by FOIA.

37. Plaintiffs have fully exhausted their administrative remedies for their November 1, 2012 FOIA/Privacy Act request.
38. Plaintiffs now turn to this Court to enforce the remedies and public access to agency records guaranteed by the FOIA and the Privacy Act.
39. On January 21, 2009 President Barack Obama issued an Executive Memo declaring the following policy: “The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. . . . All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”

CAUSES OF ACTION

Violation of the Freedom of Information Act

40. Plaintiffs repeat the allegations in paragraphs 1 through 39.
41. BOEM’s failure to disclose the requested documents is a violation of FOIA, 5 U.S.C. § 552, and the agency’s own regulations promulgated thereunder.
42. Plaintiffs’ FOIA request has been wrongfully denied and Defendant is improperly withholding requested records.

Violation of the Privacy Act

- 43. Plaintiffs repeat the allegations in paragraphs 1 through 39.
- 44. Defendant's failure to provide the records requested violates the Privacy Act, 5 U.S.C. § 552a(d), and the agency's own regulations promulgated thereunder.
- 45. Plaintiff Monnett's Privacy Act request has been wrongfully denied and information pertaining to Dr. Monnett has been improperly withheld.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully requests and prays that this Court:

- i. Enter an Order declaring that BOEM has wrongfully withheld the requested agency records and records pertaining to Dr. Monnett;
- ii. Issue a permanent injunction directing BOEM to disclose to Plaintiffs all wrongfully withheld documents;
- iii. Maintain jurisdiction over this action until BOEM is in compliance with the FOIA, the Privacy Act, Administrative Procedure Act, and every order of this Court;
- iv. Award Plaintiffs attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E) and 5 U.S.C. § 552a(g)(2)(B); and
- v. Grant such additional and further relief to which Plaintiffs may be entitled.

Dated: April 12, 2013

Respectfully submitted,

/s/ Kathryn Douglass

Kathryn Douglass

DC Bar No. 995841

Staff Counsel

Public Employees for Environmental Responsibility

2000 P Street, NW Suite 240
Washington, D.C. 20036
(202) 265-7337

Counsel for Plaintiffs